Bureau of Competition Policy

Speech

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"THE CANADIAN COMPETITION ACT AS A MODEL OF FLEXIBLE, FORWARD-LOOKING COMPETITION LAW"

SPEAKING NOTES

GEORGE N. ADDY

DIRECTOR OF INVESTIGATION AND RESEARCH

BUREAU OF COMPETITION POLICY

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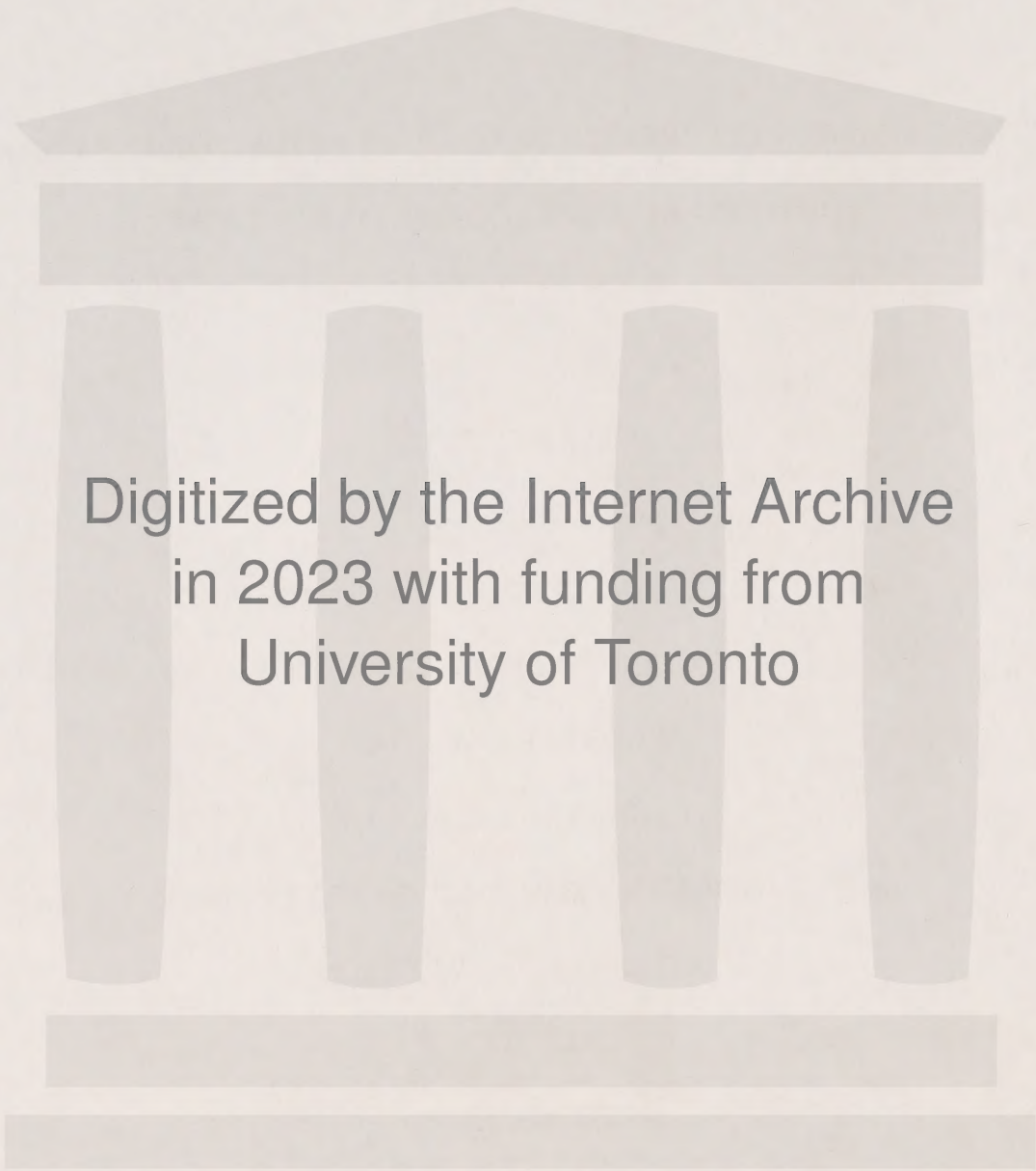

Thank you to the *Secretaria de Comercio y Fomento Industrial.* I am particularly happy to have the opportunity to speak to this conference on the promotion of competitiveness in Mexico. I strongly believe that Canada's competition policy framework is fostering my country's ability to compete internationally. Today's discussion of competition policy is especially timely and appropriate as Mexico begins the process of implementing its new *Federal Law of Economic Competition*, and as we await the ratification and implementation of the North American Free Trade Agreement.

I am an unequivocal advocate of competition and Canada's competition policy. Why? Because I believe that:

- long term economic growth and consumer well-being are fostered by competition;
- given the internationalization of markets, competition policy must be flexible enough both to foster competition and to enable business to make the structural adjustments necessary to respond to contemporary market demands;
- a framework which permits and encourages robust competition is an important component of a government's national economic policy; and,
- strong enforcement is an important part of a total compliance approach to competition law.

In the *New York Times* last month William Taylor argued, quite convincingly in my view, that we live in an age of creative destruction. Recently, many giant companies, in many important sectors, have seen their comfortable worlds shattered.

Very powerful forces such as deregulation and trade liberalization are compelling business to reinvent itself. Up to the minute technology is available to anyone, and companies that start fresh and think fresh are gaining a significant edge over successful but tired corporations that have spent years, perhaps decades, reinventing bad habits.

The realities of contemporary markets have given a new slant to the term "able to compete overseas." Today, with trade barriers coming down and products from the four corners of the world available just about anywhere, even Canadian companies that stay at home have to meet an onslaught of foreign competition to survive. They are, in effect, "competing abroad" even if they do not export, even if they are content with local markets.

Just as businesses have to expand their horizons to survive, government framework policies must also adjust to the new realities. In Canada, we began this adjustment process in the mid 1980s. The Canadian *Competition Act*, for example, was completely reworked in 1986 to foster even stronger competition and more intense rivalry in our domestic marketplace, so that Canadian companies would become more efficient and better able to compete abroad.

Competition policy has a particularly important role to play in our era of globalization and trade liberalization. While trade liberalization, internationalization and deregulation can invigorate markets, they are not a substitute for competition law. The fact that Canada faces strong rivalry from overseas heightens the need for effective competition policy. To face strong rivals, you have to be strong yourself.

Competition law defines the rules and the environment within which Canadian companies can develop the strength they need to compete.

The revised *Competition Act* successfully anticipated the challenges arising from globalization and trade liberalization. For example, the Act is fully compatible with the Canada-U.S. Free Trade Agreement and, more recently, NAFTA. It also explicitly recognizes the need for industry to adjust by providing an efficiency gains defence for otherwise offensive mergers.

When our law was revised, Canada was still in many ways a small, regulated and protected economy, with inefficient manufacturing capacity and high cost distribution systems. The 1986 *Competition Act* embodied the legislative changes required to facilitate the move by Canadian industry to a more open and deregulated economy.

As a result of these legislative changes, Canadian competition policy and merger law facilitate both competition and the restructuring of industries at home, in order to promote success internationally. The changes we made were initially coincident with the move to a free trade arrangement with the United States, our largest trading partner.

Many previously regulated industries have been deregulated or are in the middle of transition: for example, the air transportation and telecommunications industries.

Although our law was designed to address many situations, if you could boil down the approach Canada took in 1986 to one single theme it would be this: action

should be taken when firms achieve or exercise market power in ways which have an adverse impact on economic welfare.

The 1986 *Competition Act* incorporates both criminal and civil law. Criminal law deals with matters which are unambiguous in the harm they do to a well functioning marketplace. Civil law, on the other hand, is more appropriate to address matters such as mergers, abuse of dominant position, exclusive dealing and tied selling.

The criminal prohibitions are directed against activities such as bid rigging and conspiracies that unduly lessen competition, and a variety of other activities such as price maintenance, misleading advertising and predatory pricing. You should be aware that, even with regard to agreements in restraint of competition, our law is framed to allow for some economic flexibility.

In contrast to the U.S. *per se* approach, whereby certain activities are considered to be illegal in and of themselves, Canadian legislation contains an express requirement for the prosecution to establish that an alleged agreement would prevent or lessen competition "unduly." Anti-competitive effect must be demonstrated.

The civil provisions of the Act concern matters that are better dealt with outside the criminal law. A civil adjudicative model is more appropriate for dealing with various issues which may have an ambiguous competitive impact. Mergers, for example, may be either pro-competitive or anti-competitive. Thus, they require a sophisticated consideration of their potential economic effects, a consideration which does not lend itself to the criminal process.

Only mergers that substantially prevent or lessen competition, without offsetting gains in efficiency, are subject to challenge. Here, Canadian law is again different from U.S. law. In Canada, efficiency gains are judged on their benefit to society as a whole, whether they accrue either to consumers or to corporations. This provision is unique to Canadian law, and it is an example of a forward-looking approach to merger analysis.

Since the law has been in place, 1 040 mergers have been assessed and some 33 have required some form of intervention. Therefore, the law has been shown to be flexible enough to protect competition and allow industrial adjustment.

A new Competition Tribunal was also created in 1986 to deal exclusively with mergers, abuse of dominant position, joint ventures and vertical non-price restraint of trade. The *Competition Act* confers the task of adjudicating civil matters on the Competition Tribunal, while the criminal courts ultimately adjudicate criminal charges.

Investigative as well as enforcement responsibility is vested in my Office, which is an independent law enforcement body. The Director of Investigation and Research is responsible for both civil and criminal investigations, and for bringing civil matters before the Tribunal or referring criminal matters to the Attorney General for prosecution.

It is important to stress that Canadian competition policy is applied principally as a framework policy and, as such, is intended to outline the rules of the game and intervene only selectively and reactively in the marketplace. In general, business

decisions are left to market participants, rather than being dictated by competition policy.

As I mentioned earlier, the guiding principle of the *Competition Act* is to foster competition and rivalry in the domestic marketplace, so that companies will become more efficient and better able to compete in markets both in Canada and abroad. The Act does not see competition as an end in itself. Rather, competition is a means to achieve dynamic efficiencies in the economy, and to provide competitive prices and quality products and services to Canadian industry and consumers.

I believe that the Act has played an important role in the past seven years in facilitating the structural adjustment of Canadian industry to global change. The Act expressly recognizes the role of foreign competition, and the objective of enhancing Canadian competitiveness. It contains a number of provisions designed to assist Canadian industry to respond to global developments; these include provisions related to specialization agreements and research and development joint ventures.

The international aspects of competition policy have received more and more attention over the past seven years, and I think that this trend will continue. Competition policy is a relatively recent development in many parts of the world; however, as economies seek greater reliance on market forces, a concurrent expansion and strengthening of competition policy is taking place internationally. More and more countries are beginning to consider designing and adopting competition policy frameworks.

This trend is inevitable. As markets expand beyond their national boundaries, laws governing market behaviour must reflect the new business reality. Businesses and policies that ignore this reality will fail.

Canada has promoted the idea that the introduction and enforcement of antitrust law throughout the world is in everyone's interest. On a bilateral basis Canada has had productive discussions and exchanges with your own country, Mexico, and also with many other nations, large and small, which are exploring the field of competition policy. These include Malaysia, China, Barbados, Algeria, Poland and countries of the former Soviet Union. Canada also has more formalized relationships; for example, with the U.S.A., Australia and the European Community.

Canada is also very active at various multilateral forums such as the Organization for Economic Cooperation and Development and the United Nations Conference on Trade and Development: in promoting the adoption of competition laws around the world, in offering technical assistance, and fostering greater cooperation among antitrust jurisdictions. Likewise, the importance of competition policy to trade liberalization and market integration is fully recognized in Europe, where competition policy is playing a fundamental role under the European single market project, and in adding the European Free Trade Area and ex-Warsaw Pact countries to the European Community.

Traditionally, interactions between antitrust agencies have centred on the need to contain friction resulting from the extra-territorial application of antitrust laws.

Globalization, however, has gradually shifted the focus of international antitrust relations. While the need to protect competition within a nation's borders has retained its importance, the impact of competition policy enforcement increasingly cuts across borders, as markets become more and more international.

Globalization has thus heightened pressures for international convergence and expanded international cooperation in antitrust enforcement. It has accelerated the internationalization of competition policy, and you can see the results in multilateral trade negotiations, where competition policy is gaining increased prominence. The inclusion of a chapter on competition in the recently concluded NAFTA, and competition policy perspectives in the draft Uruguay Round texts, testify to this growing trend.

I would argue that trade liberalization increases the need for active antitrust enforcement: to ensure that government-imposed trade barriers are not replaced by private restraints on trade; and to facilitate competitiveness in sectors which are not yet under the discipline of international market forces.

There are many questions to ask here, and no easy answers. What kinds of intergovernmental cooperation are required to ensure that a healthy level of competition can be maintained in national economies? What are the acceptable limits to the extra-territorial application of antitrust laws? How much convergence in competition policy standards is achievable?

I do not have all the answers, but I do know that a good beginning has already been made towards the ultimate objective of harmonizing policy goals that are often in conflict, within and among nations. This harmonization could help competition policy provide international benefits on the same scale as it has domestic benefits.

I conclude by thanking you all for your very warm hospitality. I look forward to an informative and lively discussion.